83-1209

CASE NO.

in the Supreme Court of the United States

ANGORA ENTERPRISES, INC.,
and JOSEPH KOSOW,

Petitioners,

vs.

BENJAMIN COLE and MIRIAM COLE, his wife; HARRY LOWENKRON and THELMA LOWENKRON, his wife; GEORGE H. WEBB and LAHJA T. WEBB, his wife on behalf of themselves and all other members of the Condominium Association of Lakeside Village, Inc., similarly situated, and CONDOMINIUM ASSOCIATION OF LAKESIDE VILLAGE, INC., a Florida corporation, not for profit, in its own interests and on behalf of its members,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

DID THE FLORIDA SUPREME COURT VIOLATE THE PRINCIPLES GOVERNING WAIVER OF FEDERAL CONSTITUTIONAL RIGHTS WHEN IT HELD THAT A CONTRACT CLAUSE INCORPORATING FLORIDA LAW "AS AMENDED" CONSTITUTED WAIVER OF A PARTY'S RIGHT TO BE FREE FROM LEGISLATIVE IMPAIRMENT OF CONTRACTS?

CONSTITUTIONAL PROVISION INVOLVED

ARTICLE I, §10

No state shall . . . pass any Bill of Attainder ex-post facto law, or law impairing the obligation of Contracts.

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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1983

ANGORA ENTERPRISES, INC.,
and JOSEPH KOSOW,

Petitioners,

vs.

BENJAMIN COLE, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners Angora Enterprises, Inc., and Joseph Kosow request that a Writ of Certiorari issue to review the judgment and opinion of the Florida Supreme Court which, according to the Respondent, holds that a lease clause agreeing to be bound by the Condominium Act

of Florida, "as the same may be amended from time to time" actually constituted a waiver of Petitioners' Article I, §10, federal constitutional right to be free from legislative impairment of contracts.

We anticipate the Respondent's interpretation of the Florida Supreme Court's decision because the economic stakes in this case are high, and Petitioners wish to avoid a costly procedural Hobson's choice by seeking certiorari or, with this Court's approval, a certificate from the Florida Supreme Court as to whether that Court decided the federal question presented by this Petition.[1]

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[1]The Petitioners have taken the position that the Florida Supreme Court could not have properly addressed the federal question of Article I, §10 waiver, and have filed a declaratory judgment action in the United States District Court for the Southern District of Florida raising the federal question. The Respondents have sought dismissal of that action, claiming the federal question was decided by the Florida Supreme Court.

The Florida Supreme Court was asked if it had decided the federal question, Appendix 1-3, but refused to answer, Appendix 5-6.

Although it may appear strange for a certiorari Petitioner to assert a Respondent' s view that the federal question was decided, fairness and good lawyering demands it. A client should not have to risk substantial loss on differing views of arcane federal jurisdictional problems.

This case is a candidate for the "certificate" process of *Lynum v. Illinois*, 368 U.S. 908 (1961), discussed *infra* at p. 11, and the Petitioners request an opportunity to seek such a certificate if the Court is unsure whether the Florida Supreme Court decided the federal question.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 439 So.2d 832 (Fla.1983). A copy of the Order Denying Rehearing and the opinion, appear at Appendix 5, 7 in this Petition. A copy of the intermediate Florida Appellate Court opinion which preceeded the Florida Supreme Court ruling is at Appendix 15.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on June 16, 1983. A timely filed petition for rehearing was denied on October 27, 1983. This Petition has been filed within 90 days of that date pursuant to Supreme Court Rule 20.2. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

Respondents sued Petitioners in the state trial court seeking, inter alia, to invalidate a condominium recreation lease which contained a clause calling for a cost of living increase every five years. The Respondents are condominium unit owner lessees. The Petitioners are the recreation lease lessors.[2]

The unit owners' complaint was dismissed by the trial court upon the Petitioners' motion to dismiss. A series of appeals ultimately led to the Florida Supreme Court opinion which prompts this Petition. The only

[2]Angora is the developer and original lessor. Kosow is a purchaser of the lease, and is tied to Angora *via* a purchase money mortgage. Appendix 10.

issue presented involves the problem posed by the contract's recreation lease escalation clause.

The escalation clause was a valid contractual provision in 1975 when the contract was signed. In 1977 the Florida legislature enacted §718.401(8)(a), Fla.Stat., which declared "that the public policy of this state prohibits the inclusion or enforcement of escalation clauses in . . . leases . . . for recreational facilities. . . ."[3]

In *Fleeman v. Case* 342 So.2d 818 (Fla.1977), the Florida Supreme Court held that the statutory prohibition against escalation clauses did not apply to pre-existing leases, citing both legislative intent and the United States Constitution, Article I, §10, prohibition against legislative impairment of contracts. *Id.*, 342 So.2d at 818.

In the instant case, the Florida Supreme Court acknowledged the relevance of the *Fleeman v. Case*

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[3]The statute, in full, §718.401(8)(a), states:

> It is declared that the public policy of this state prohibits the inclusion of or enforcement of escalation clauses in land leases or other leases or agreements for recreational facilities, land, or other commonly used facilities serving residential condominiums, and such clauses are hereby declared void for public policy. For the purposes of this section, an escalation clause is any clause in a condominium lease or agreement which provides that the rental under the lease or agreement shall increase at the same percentage rate as any nationally recognized and conveniently available commondity or consumer price index.

rationale, but found it inapplicable, because here the lease contained the following language:

> ANGORA ENTERPRISES, INC. . . . Hereby states and declares that said realty, together with improvements thereon, is submitted to Condominium ownership, pursuant to the Condominium Act of the State of Florida, F.S. 711 et seq. (hereinafter referred to as the "Condominium Act"), *and the provisions of said Act are hereby incorporated by reference and included herein thereby*, ...
>
> . . . .
>
> (Subsection G of Article I defines condominium act as follows:)
>
> Condominium Act, means and refers to the Condominium Act of the State of Florida (F.S. 711 Et Seq.) *as the same may be amended from time to time.*
>
> App. 12, 439
> So.2d at 834
> (emphasis added).

Based solely on that language, the Florida Supreme Court concluded that Petitioners had agreed their contract would be governed by the subsequently enacted ban on escalation clauses:

> Since the parties had agreed to be governed by amendments to the Act, they therefore

agreed to be bound by the purview of this statute.

App. 13, 439
So.2d at 834-835.

There has never been any evidence adduced on the issue of whether the "incorporation as amended clause" constituted a knowing and intelligent waiver of Petitioners' Article I, §10, right to be free from legislative impairment of contracts. The Florida Supreme Court's decision was based solely on the contractual language set forth above. Since the case entered the state appellate process on Respondents' appeal from their dismissed complaint, Petitioners have never had the opportunity to assert their answer and affirmative defense of no knowing and intelligent waiver of their Article I, §10, rights. [4]

Since there is no dispute that retroactive application of the no escalation clause statute would violate Article I, §10, this case presents the question of whether general contractual language incorporating future state law "as amended" constitutes a knowing and intelligent waiver of the constitutional right to be free from legislative impairment of contracts.

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[4]Florida Rules of Civil Procedure parallel the Federal Rules. Petitioners' successful trial court motion to dismiss Respondents' complaint for failure to state a cause of action rendered an answer and affirmative defenses unnecessary. *See* Rule 1.140(b), Florida Rules of Civil Procedure.

REASONS FOR GRANTING CERTIORARI

I

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS GOVERNING THE STANDARD FOR DETERMINING WAIVER OF FEDERAL CONSTITUTIONAL RIGHTS.

The contract clause of Article I, §10, has been historically described "as the centerpiece of the Constitution's protective armor, with the fifth amendment's ban on uncompensated takings of property serving as a kind of backstop". Tribe, American Constitutional Law, p. 457, (1978).

"[W]aiver affecting federal rights is a federal question." *Fay v. Noia*, 372 U.S. 391, 439 (1963); *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972).

This Court has set a high standard for determining waiver of constitutional rights.

> In the civil area, the Court has said that "[W]e do not presume acquiescence in the loss of fundamental rights" . . . Indeed, in the civil no less than the criminal area, "Courts indulge every reasonable presumption against waiver."
>
> *Fuentes v. Shevin*, 407 U.S. 67 at 94, n. 31 (1972).

The Court continued in *Fuentes:*

> For a waiver of constitutional rights in any context must, at the very least, be clear. We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver.

Id., 407 U.S. at 95.

The Florida Supreme Court decision violated every precept of *Fuentes.*

The contract language incorporating Florida law "as the same may be amended from time to time" does not, on its face, amount to waiver or agreement to loss of Article I, §10, protection. Indeed, given the presumed expectation that a legislature will act in a constitutional fashion, the only presumption raised by the language is agreement to be bound by lawful legislative acts.

If voluntariness and intelligent acquiescence are the *sine qua non* for waiver, presuming contract clause waiver from "as amended" language is especially inappropriate. Contract clause violations always occur after a contract has been consummated. Article I, §10, seeks to protect parties from subsequent governmental action destroying their contractual agreements. Therefore, presuming one has voluntarily and intelligently agreed to waive rights which are not extant at the time is inconsistent with established constitutional waiver doctrine requiring "an intentional relinquishment or abandonment of a known right or privilege". *Johnson v. Zerbst*, 304 U.S. 458,464 (1938).[5]

We do not contend there can be no waiver of Article I, §10, rights. If the complaining party were aware of the significance of his language, and its consequences, waiver could be found. cf. *D. H. Overmyer*, 405 U.S. at 186.

But where the contractual language does not, on its face, constitute waiver, or where there has been no opportunity to adduce evidence relevant to the factual inquiry posed by the knowing, voluntary and intelligent standard for determining waiver, waiver cannot be found.

The Florida Supreme Court's contrary finding is in conflict with this Court's decisions. That conflict,

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[5]The *Johnson v. Zerbst* language arose in a criminal case. In the past the Court has assumed the civil waiver standard "is the same standard applicable to waiver in a criminal proceeding". *D. H. Overmyer Co.*, 405 U.S. at 185.

and the fact that this Court has never clearly addressed civil, contract clause waiver, makes this case an appropriate candidate for certiorari.[6]

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[6]The Respondents will claim that *United States Mortgage Co. v. Matthews*, 293 U.S. 232 (1934), is both apposite and dispositive. The decision, which was never referred to by the Florida Supreme Court, does not control this case.

United States Mortgage Co. v. Matthews was a depression era decision which permitted a new statutory partial limitation on the use of summary foreclosure proceedings to be applied to a pre-existing mortgage, where the mortgage contained a clause agreeing to "any amendments or additions" to Maryland mortgage law.

The case, which has apparently never been subsequently cited for the proposition now urged by the Respondent, is inapposite for several reasons.

First, the change in the Maryland law did not preclude future use of summary foreclosure procedures, it merely conditioned them upon acquiescence of 25% of the debt holders. Thus, the change was a procedural, remedial one, and not a substantive one which altered the contract so as to deny settled economic expectations and "seriously impair the value of the right" encompassed by the contract. *Richmond Mortgage Corp. v. Wachovia Bank*, 300 U.S. 124,128 (1937). Therefore, contract clause waiver was not truly an issue.

Second, there was no discussion in the case of waiver; indeed, the 1934 decision predates by nearly forty years the crystallization of the waiver standards to be applied to private contractual agreements which pose issues of fundamental constitutional rights. *Fuentes v. Shevin; D. H. Overmyer Co., Inc., v. Frick Co., supra.*

II

THE DECISION ON CERTIORARI SHOULD BE DELAYED TO PERMIT AN OPPORTUNITY TO SECURE A CERTIFICATE FROM THE FLORIDA SUPREME COURT REGARDING WHETHER A FEDERAL QUESTION WAS PASSED UPON.

We have set forth in footnote 1 the parties' respective positions regarding the question of whether the Florida Supreme Court had before it, and decided, the federal question of waiver of the rights guaranteed by the contract clause of the United States Constitution, and the Florida Supreme Court's declination of the chance to resolve the matter. See Appendix 5.

In *Lynum v. Illinois*, 368 U.S. 908 (1961), the Court deferred consideration of the petition for certiorari to accord petitioner's counsel an opportunity to secure a certificate from the Illinois Supreme Court to determine if that Court had passed upon the federal question presented by the petition.

Such a certificate, if affirmative, will support review by this Court. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20,22-23 (1974); *Herb v. Pitcairn*, 324 U.S. 117,127 (1945).

The Florida Supreme Court, if alerted to the fact that this Court's certiorari review awaits a certificate, might reconsider its earlier refusal to act, and answer the question of whether it passed upon the federal waiver issue in its opinion.

Fairness and judicial economy counsel the certificate course. If, as Respondents contend, the federal question of waiver was presented and addressed, then only this Court may review the decision.

If, as Petitioners have contended in the United States District Court, the federal question of waiver necessitates a fact finding inquiry, and the Florida Supreme Court did not reach the question, then certiorari is not yet appropriate.

It would be better for the Florida Supreme Court to provide an answer, than for the District Court, and this Court to attempt to unravel the obtuse meaning of the Florida Supreme Court's cryptic language. The press of cases in the United States District Court for the Southern District of Florida and in this Court, compels the conclusion that the *Lynum* process should be utilized.

The Petitioners suggest the certificate should state that consideration of the petition for certiorari is deferred to allow petitioners' counsel to secure a certificate from the Supreme Court of Florida as to whether its judgment addressed the federal question of the proper standard for evaluating waiver of the Article I, §10, right to be free from legislative impairment of contracts.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted, or the Petition should be deferred while a certificate from the Florida Supreme Court is sought.

Respectfully submitted,

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January, 1984

Appendix

IN THE SUPREME COURT OF FLORIDA

CASE NOS. 61,378 and 61,396

ANGORA ENTERPRISES, INC., etc., et al.,

Petitioners,

vs.

BENJAMIN COLE, et ux., et al.,

Respondents.

JOSEPH KOSOW,

Petitioner,

vs.

BENJAMIN COLE, et ux., et al.,

Respondents.

SUPPLEMENTAL REQUEST FOR CLARIFICATION

Petitioners have heretofore timely filed their Motion for Rehearing which is presently pending and herewith submit for this Court's consideration their Supplemental Request for Clarification, *cf.* Rule 1:530(b), Fla.R.Civ.P.

The Court's June 16, 1983, opinion held that contract language incorporating by reference the provisions of the Florida Condominium Act "as the same may be

amended from time to time" constituted an agreement to be bound by the legislature's subsequent prohibition upon the enforcement of recreation lease escalation clauses. The Court wrote:

> Since the parties had agreed to be governed by amendments to the act, they therefore agreed to be bound by the purview of this statute. [§718.401(8)].
>
> Slip opinion at 5.

The Court acknowledged the statute could not have been validly applied, were it not for the "Agreement." The United States Constitution, Article I §10, prohibition against legislative *impairment of* contracts would have precluded its application. *See Fleeman v. Case*, 342 So.2d 815 at 818, cited in the opinion at page 5.

Petitioners pose the following question for clarification:

> DID THE COURT'S "AGREEMENT" HOLDING MEAN THAT THE INCORPORATION CLAUSE CONSTITUTED A KNOWING AND INTELLIGENT WAIVER OF PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO BE FREE FROM LEGISLATIVE IMPAIRMENT OF CONTRACTS?

The query is important. An affirmative answer would raise the federal question of what constitutes waiver of the constitutional rights to be free from

legislative impairment of contracts. A negative answer would leave the federal question available as an affirmative defense upon remand to the Trial Court. *See* Rule 1.110, Fla.R.Civ.P. This Court's opinion provides no insight into the problem; therefore, the Petitioners seek clarification.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to MARK B. SCHORR, ESQUIRE, Becker, Poliakoff & Streitfeld, P.A., 6520 North Andrews Avenue, Post Office Box 9057, Fort Lauderdale, Florida 33310, this 30th day of August, 1983.

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By: _____
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[RECEIVED]
[OCT 31 1983]

IN THE SUPREME COURT OF FLORIDA
THURSDAY, OCTOBER 27, 1983

CONSOLIDATED CASES
CASE NO 61,378

District Court of Appeal,
4th District – Nos.
79-2269 & 80-939

ANGORA ENTERPRISES, INC., ETC., ET AL.,
Petitioners,

vs.

BENJAMIN COLE, ET UX., ET AL.,
Respondents.

CASE NO. 61.396

JOSEPH KOSOW,
Petitioner,

vs.

BENJAMIN COLE, ET UX., ET AL.,
Respondents.

On consideration of the motion for rehearing and the supplemental request for clarification filed by attorneys for petitioners,

IT IS ORDERED by the Court that said motion and supplemental request are hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: [Illegible] Causseaux

C

cc: Hon. Clyde L. Heath, Clerk
Hon. John B. Dunkle, Clerk
Hon. Paul T. Douglas, Judge

Chesterfield Smith, Esquire
Michael L. Rosen, Esquire
Gerald Mager, Esquire
and Maurice M. Garcia, Esquire
Robert S. Levy, Esquire
Joel D. Eaton, Esquire
Mark B. Schorr, Esquire

ANGORA ENTERPRISES, INC. etc. et al.,
Petitioners

v.

Benjamin COLE et ux., et al.,
Respondents.

Joseph KOSOW,
Petitioners

v.

Benjamin COLE et ux., et al.,
Respondents.

Nos. 61378, 651396

Supreme Court of Florida.
June 16, 1983.
Rehearing Denied Oct. 27, 1983.

EHRLICH, Justice

This is a petition to review a decision of the Fourth District Court of Appeal, *Cole v. Angora Enterprises*, 403 So.2d 1010 (Fla. 4th DCA 1981). That decision concerned enforceability of an escalation clause in a recreational lease attached to a declaration of condominium, and other issues relating to condominiums. The district court affirmed in part and reversed in part and then certified the following questions:

> (1) Whether the lessor expressly consented to the incorporation of Florida Statute 718.401(4) into the terms of the contract.

(2) Whether the rent escalation clause is rendered unenforceable.

(3) Whether the assignment and sale of the long term lease in exchange for a purchase money mortgage permits of the disbursement of funds from the registry of the court to pay said purchase money mortgage and

(4) Whether the condominium association and its unit owners may at this stage state a cause of action under the facts of this case for breach of fiduciary duty and self dealing.

403 So.2d at 1014.[1] We have jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution.

---

[1]The two sections under discussion are as follows:

§718.401, Fla. State. (1977)
(4)(a). In any action by the lessor to enforce a lien for rent payable or in any action by a unit owner with respect to the obligations of the lessee or the lessor under the lease, the unit owner may raise any issue or interpose any defenses, legal or equitable, that he may have with respect to the lessor's obligations under the lease. If the unit owner initiates any action or interposes any defense other than payment of rent under the lease, the unit owner or the association shall pay into the registry of the court any allegedly accrued rent and the rent which accrues during the pendency of the proceeding, when due. If the unit owner fails to pay the rent into the registry of the court, it shall constitute an absolute waiver of the unit owner's or association's defenses other than payment, and the lessor shall be entitled to default. When the unit owner has deposited the required funds into the registry of the court, the lessor may apply to the court for disbursement of all or

We hereby affirm the judgment of the district court for the reasons set forth herein.

Petitioners are Angora Enterprises, developer of a condominium and original lessor under a recreational lease, and American Capital Corporation (Viking), the parent corporation of Angora, and Joseph Kosow, the present owner and lessor of the leased property.

(Footnote 1 Continued)

part of the funds shown to be necessary for the payment of taxes, mortgage payments, maintenance and operating expenses, and other necessary expenses incident to maintaining and equipping the leased facilities or necessary for the payment of other expenses arising out of personal hardship resulting from the loss of rental income from the leased facilities. The court, after an evidentiary hearing, may award all or part of the funds on deposit to the lessor for such purpose. The court shall require the lessor to post bond or other security, as a condition to the release of funds from the registry, when the value of the leased land and improvements, apart from the lease itself, is inadequate to fully secure the sum of existing encumbrances on the leased property and the amounts released from the court registry. (8)(a) It is declared that the public policy of this state prohibits the inclusion or enforcement of escalation clauses in land leases or other leases or agreements for recreational facilities, land, or other commonly used facilities serving residential condominiums, and such clauses are hereby declared void for public policy. For the purposes of this section, an escalation clause is any clause in a condominium lease or agreement which provides that the rental under the lease or agreement shall increase at the same percentage rate as any nationally recognized and conveniently available commodity or consumer price index.

Respondents Cole, et al, are owners of condominium units and the condominium association which operates those condominiums.

Prior to 1975, Angora Enterprises developed the Lakeside Village condominum complex. Although the developer sold the individual units outright, it retained title to a certain portion of the property and developed it as a recreational facility. Persons purchasing units in the condominium received a copy of the declaration of condominium with the lease for use of the recreational facilties attached to it. That document bound each unit member upon purchasing a condominium unit and becoming a member of the association to pay a proportional share of the rent on the recreational facilities. A clause in the lease called for an escalation in the rent every five years, based on an increase in the cost of living index.

This controversy centers around the escalation clauses in eleven recreational leases. Begun in 1975, the action alleged violations of both the Deceptive and Unfair Trade Practices Act, and Condominium Act, and challenged the validity of the escalation clauses. It was coupled with a motion to pay the rent into the registry of the court as provided by section 718.401, Florida Statutes (1977). The trial court dismissed the action and, while an appeal was pending, Angora assigned the lease to Kosow who assumed the existing institutional mortgage and gave back to Angora a purchase money mortgage for the balance of the sale price. The Fourth District Court affirmed in part and reversed in part. *Cole v. Angora Enterprises*, 370 S.2d 1227 (Fla. 4th DCA 1979).

The complaint was then refiled along with another motion for leave to deposit rent into the registry. Petitioner Kosow sought disbursement of the funds to make payment on the mortgage under section 718.401(4), Florida Statutes (1977). This motion was granted over respondents' objection that it was not the type of mortgage contemplated by the statute. Respondents appealed this order. The trial court again dismissed the complaint and awarded attorneys' fees to the petitioner. The district court of appeal consolidated review of this order and the review of the order to disburse funds. It then decided the cause and certified the questions as being of great public importance. We will respond to the questions in order.

[1] First, we are asked to decide whether or not the petitioner lessor expressly consented to the incorporation of section 718.401(4), Florida Statutes (1977), into the terms of the contract by virtue of the language in the declaration of condominium. That language set forth in the submission section of the declaration reads as follows:

> ANGORA ENTERPRISES, INC. . . . hereby states and declares that said realty, together with improvements thereon, is submitted to Condominium ownership, pursuant to the Condominium Act of the State of Florida, F.S. 711 et seq. (hereinafter referred to as the "Condominium Act."), *and the provisions of said Act are hereby incorporated by reference and included herein thereby*, ...
>
> . . . .

(Subsection G of Article I defines condominimum act as follows:)

> Condominium Act, means and refers to the Condominium Act of the State of Florida (F.S. 711 Et Seq.) *as the same may be amended from time to time.*
>
> (Emphasis added).

Further on in the declaration we find specific references to the attached long term-lease which is "attached to this Declaration and made a part thereof." The declaration is signed by the developer and the condominium association, the same two parties who signed the lease. The lease also refers back to the declaration and not only sets the monthly fee for use of the recreational facilities, but provides for a first lien on the unit owner's property should that unit owner fail to make the monthly rental payment.

The lessor argues that these are separate documents, each standing alone, but to adopt that rationale is to ignore the realities of the situation. And to say that the lessor who in his corporate capacity was both the developer and the management firm, did not agree to the terms of declaration is to refuse to see what is plainly written in black and white.

Consequently, we agree with the district court that this case as to the rent deposit statute is controlled by our decision in *Century Village, Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condominium Association*, 361 So.2d 128 (Fla. 1978), that the parties intended to be

bound by future amendments to the condominium act and as such section 718.401(4) is applicable and enforceable under the facts of the instant case.

[2] It logically follows that section 718.401(8), the statute that declares escalation clauses in recreation or land leases void and unenforceable, also was encompassed by the language in the declaration. Since the parties had agreed to be govered by amendments to the act, they therefore agreed to be bound by the purview of this statute.

Petitioners argue that this case is controlled by *Fleeman v. Case*, 342 So.2d 815 (Fla. 1977). That case held that this statute could not be applied to pre-1974 leases because the legislature did not intend retroactive effect. We are compelled to outline the distinction between *Fleeman* and the case at bar. The controlling difference is the fact that there was no language in the *Fleeman* documents evidencing consent on the part of the lessor to incorporate the Condominium Act and its future amendments into the contract. *See also Kaufman v. Shere*, 347 So.2d 627 (Fla. 3d DCA 1977).

[3] As to the last two questions, we agree with the district court's analysis. We agree with the district court that this assignee accepted the assignment with notice of the dispute over the rents. Therefore, under these circumstances, since the assignor was without power to withdraw the funds to pay other than the institutional mortgage in existence when the litigation began, the assignee must likewise be impotent to do so. *Florida East Coast Railway v. Eno*, 99 Fla. 887, 128 So. 622 (1930).

[4] Finally, we consider whether or not a condominium association and its unit owners may state a cause of action for breach of fiduciary duty and self dealing when a recreational lease is executed. This is, of course, controlled by *Avila South Condominium Association v. Kappa Corp.*, 347 So.2d 599 (Fla. 1977). Though the association and its unit owners could have done so at an earlier stage in the litigation, it is now too late. *United States Fidelity & Guaranty Co. v. Sellers*, 197 So.2d 832 (Fla. 1st DCA), *cert. denied*, 204 So.2d 211 (Fla. 1967).

The decision of the district court is approved and this cause is remanded for further proceedings.

Both parties have petitioned for attorneys' fees. Pursuant to section 718.303(1), Florida Statutes (1981) and the terms of the lease, the respondents as the prevailing parties are entitled to recover reasonable attorneys' fees. The case is remanded to the trial court for determination of such fees.

It is so ordered.

ALDERMAN, C.J., and ADKINS, OVERTON and McDONALD, JJ., concur.

BOYD, J., dissents.

Benjamin COLE and Miriam Cole,
his wife, et al, Appellants,

v.

ANGORA ENTERPRISES, INC., etc., et al, Apellees.

Nos. 79-2269, 80-939.

District Court of Appeal of florida,
Fourth District.

July 15, 1981.

Rehearings Denied Oct. 8, 1981.

LETTS, Chief Judge.

Before us is yet another appeal emanating from a condominium dispute over a long term recreational lease and a trial judge's order permitting disbursement of moneys held in the registry of the court pursuant to Section 718.401(4) and 718.401(8), Florida Statutes (1977). As a result the trial judge also awarded attorneys fees to the lessor under the lease. We reverse in part and in so doing consider only those facts and legal issues which are dispositive of this particular litigation.

We are, of course, familiar with the Supreme Court's decision in *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1979) holding this very statute unconstitutional. However, *Pomponio* is not dispositive of the case now before us by reason of the Supreme Court's own concluding *Pomponio* language

holding that the statute may be valid if the lessor's express consent to the statute's incorporation into the terms of the contract has been obtained.

[1] We must, therefore, first answer the question: Has the lessor expressly consented to the statute's incorporation into the terms of the contract in the case now before us? We believe the answer is "yes." In support of our conclusion we refer to the Supreme Court's ruling in *Century Village, Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condominium Association*, 361 So.2d 128 (Fla. 1978)[1] where the court found that it need not reach the constitutional question because the developer "by specific language contained in its Declaration of Condominium, expressly agreed to be bound by all future amendments to the Condominium Act, including, but not limited to Section 711.63(4)."[2] Id. at 132. We are of the opinion that the language quoted from the declaration in *Century Village* is virtually

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[1]See also the very recent decision in *Coral Isle East Condominium v. Snyder*, 395 So.2d 1204 (Fla. 3d DCA 1981).

[2]Section 711.63(4) was, of course, the precursor to Section 718.401(4).

identical to the language employed in the declaration now before us and they are set forth below for comparison:

CENTURY VILLAGE DECLARATION	DECLARATION NOW BEFORE US
. . . [the developer] hereby states and declares that said realty, . . . together with improvements thereon, is submitted to Condominium ownership, pursuant to the Condominium Act of the State of Florida, F.S. 711 Et. Seq. (hereinafter referred to as the "Condominium Act"), *and the provisions of said Act are hereby incorporated by reference and included herein thereby*	ANGORA ENTERPRISES, INC. hereby states and declares that said realty, together with improvements thereon, is submitted to Condominium ownership, pursuant to the Condominium Act of the State of Florida, F.S. 711 et seq. (hereinafter referred to as the "Condominium Act"), *and the provisions of said Act are hereby incorporated by reference and included herein thereby* . . . .
The "Condominium Act" referred to above is defined in Section I(G) as follows:	(Subsection G of Article I defines condominium act as follows:)
Condominium Act means and refers to the condominium act of the State of Florida (Florida Statutes 711, et. seq.) *as the same may be amended from time to time.* 361 So.2d 128, 133. (emphasis in original).	Condominium Act, means and refers to the Condominium Act of the State of Florida. (F.S. 711 et. seq.) *as the same may be amended from time to time.* (R.S. 2-3) (Emphasis added).

Notwithstanding the above, the lessor argues that such language comes from the "submission statement" portion of the subject declaration and that in counsel's words "The submitted property . . . does not include (and no argument is made that it includes) the property which forms the subject matter of the Long-Term Lease." From this counsel for the lessor in an excellent brief concludes:

> Since the leased property *is not* part of the realty *submitted* to condominium *pursuant* to the *Condominium Act*, as that term is defined in the Declaration, the demised property and the lease itself are unaffected by the submission . . . The submission statement only relates to condominium property, not leased property or any other parcel.

We are impressed by this argument, but cannot distinguish it from the Supreme Court's holding in *Century Village*. The lessor suggests that this argument was never raised in *Century Village* and the point therefore not considered. However, whether specifically raised or not, the point would have to be inherent in the *Century Village* holding. Moreover we feel that fundamental fairness should dictate otherwise. The subject submission statement makes at least three patent references to the long term lease which is annexed thereto as an exhibit. As such, it was obviously intended to be an integral part of the whole. One cannot issue forth with language in the submission statement such as: "which long-term lease is attached to this Declaration and made a part hereof" and then argue that that same lease is not a part thereof pursuant to the condominium act.

We thus decide that Section 718.401(4) is applicable and enforceable under the facts of the instant case. That being so it is also inescapable that Section 718.401(8) is also applicable so that the enforceability of the rent escalation clause is void for reasons of public policy. In so holding we recede from any statement to the contrary set forth in our prior decision in *Palm Aire Country Club Association No. 2, Inc. v. F. P. A. Corporation*, 357 So.2d 249 (Fla. 4th DCA 1978) even though the instant lease, as did the one in *Palm Aire*, provides for its own exclusive method of amendment.

Concluding on this question, we would be less than candid not to concede that it appears unlikely that it could ever have been the specific intention of the developer-lessor to incorporate future Condominium Act amendments which would, for instance, preclude the collection of escalation clause rents. It is perfectly obvious that the "from time to time" language was intended to provide a safety valve and fall back position for the developer to insure the continuing integrity of the condominium from the vagaries of the legislature and the appellate courts. However, the developer-lessor should not expect to be able to invoke the "from time to time" language when it suits its purpose to do so and reject it when not to its taste and advantage. The developer-lessor has quite simply been hoisted on its own petard by these particular amendments.

Having decided the applicability of the statute, we turn now to a new twist which must be a credit to the ingenuity of this particular lessor. As we have seen, Section 718.401(4) also provides for disbursement of funds "shown to be necessary for the payment of . . . mortgage payments." Pursuant to this provision

the instant lessor, while in the middle of this law suit, has assigned his long-term lease to a third party who, for no money down, has given the lessor back a purchase money mortgage and note at 6% with no personal liability to the maker. Needless to report it is now claimed that the payments to be made on the purchase money mortgage qualify as "mortgage payments" under the statute which may be withdrawn from the registry of the court. To cries of "foul" from the unit owners, the lessor points to our own language in *Palm Aire*, supra, and parodies Gertrude Stein to the effect that "a mortgage is a mortgage is a mortgage."

[2, 3] Regardless of the bona fides of the mortgage, the record reflects that the assignee accepted the assignment with notice of the dispute over the rents. This being so, it is not important whether the purchase money mortgage and note were executed at arms length, it being our conclusion that an assignee with notice accedes to no greater rights than his assignor. *Florida East Coast Ry. Co. v. Eno*, 128 So.622 (Fla. 1930), *Alderman Interior Systems, Inc. v. First National-Heller Factors, Inc.*, 376 So.2d 22 (Fla.2d DCA 1979). As a consequence, since the assignor was without power to withdraw the funds (other than for purposes conceded by all parties, such as payment of the institutional mortgage) the assignee must be likewise impotent to do so. Our conclusion is not a finding that the purchase money mortgagor need not make his payments; it is, however, a holding that he cannot withdraw the funds to do so from the registry of the court.

[4] Passing next to the question of attorneys fees, we note the provisions of Section 718.125, Florida Statutes (Supp. 1978) which provides:

> If a contract or lease between a condominium unit owner or association and a developer contain a provision allowing attorneys fees to the developer, should any litigation arise under the provisions of the contract or lease, the court shall also allow reasonable attorney's fees to the unit owner or association when the unit owner or association prevails in any action by or against the unit owner or association with respect to the contract or lease.

Notwithstanding the foregoing quoted language the trial court struck the unit owners request for same. Needless to say the trial court was only being consistent in so doing, but in the light of our holding that the developer-lessor expressly consented to be bound by amendments to the law, we see no reason why an attorneys fee cannot here be awarded to the unit owners (and/or association) because the lease in question provided for attorneys fees upon the occasion of litigation.

This being so we see no necessity to examine any other of the theories advanced for the award of attorneys fees and on this issue we therefore remand this cause for consideration of reasonable attorneys fees. In so doing we make no determination as to the proportionate share to be paid by the original lessor-developer and the assignee who now stands in the original lessor's shoes. The apportionment of said fees shall be made at the discretion of the trial court as it may deem appropriate.

[5-7] Finally, we consider whether a condominium association and its unit owners may state a cause of action for breach of fiduciary duty and self dealing when a recreation lease is executed. The answer is yes, of course they can, so long as they come within the dictates clearly set forth in *Avila South Condominium Association, Inc. v. Kappa Corporation*, 347 So.2d 599 (Fla. 1977). However, that remedy is simply not available here because of the posture of this appeal. The original complaint in this dispute, up through the third amendment thereto, has already been appealed to this court and a decision rendered in *Cole v. Angora Enterprises, Inc.*, 370 So.2d 1227 (Fla. 4th DCA 1979). A reading of that third amended complaint reveals no attempt whatever to plead breach of fiduciary duty or self-dealing arising from the execution of the long term lease. This being so, the law is clear on this subject. Upon remand after a successful appeal the litigant may not invoke new causes of action and thus litigate his case piecemeal, otherwise "one party would thus be placed in position to prevail over the other by the process of attrition." *United States Fidelity & Guaranty Co. v. Sellers*, 197 So.2d 832, 833 (Fla. 1st DCA 1967). See also *Palm Beach Estates v. Croker*, 143 So. 792 (Fla. 1932).

We are of the belief that this decision will have wide repercussions affecting condominium living and that our conclusions here should be certified to the Supreme Court as questions of great public importance. We therefore certify this entire decision so that our Supreme Court may pass upon the four principal issues here decided. These issues involve: (1) Whether the lessor expressly consented to the incorporation of Florida Statute 718.401(4) into the terms of the contract. (2)

Whether the rent escalation clause is rendered unenforceable. (3) Whether the assignment and sale of the long term lease in exchange for a purchase money mortgage permits of the disbursement of funds from the registry of the court to pay said purchase money mortgage. And (4) whether the condominium association and its unit owners may at this stage state a cause of action under the facts of this case for breach of fiduciary duty and self dealing.

REVERSED IN PART AND REMANDED.

STONE, BARRY J., Associate Judge, concurs.

ANSTEAD, J., concurs in part and dissents in part with opinion.

ANSTEAD, Judge, concurring in part and dissenting in part:

I disagree only with the holding of the majority with reference to the appellants' right to attempt to state a cause of action "for breach of fiduciary duty and self dealing" pursuant to *Avila South Condominium Association, Inc. v. Kappa Corporation*, 347 So.2d 599 (Fla. 1977).

NO. 83-1209

in the

Supreme Court

of the

United States

ANGORA ENTERPRISES, INC.,
and JOSEPH KOSOW,

Petitioners,

vs.

BENJAMIN COLE and MIRIAM
COLE his wife, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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INTRODUCTION

Respondents, BENJAMIN COLE, et al., hereby file this Brief in Opposition to Petitioners' Petition for Writ of Certiorari to the Supreme Court of Florida. References to the Appendix to the Petition for Writ of Certiorari are prefixed by the symbol "App.". References to the Appendix to this Brief in Opposition are prefixed by the symbol "R.A.".

STATEMENT OF THE CASE AND FACTS

Petitioners' Statement of the Case is accurate, but disjointed. The relevant procedural events in this dispute are not as simple as Petitioners make them seem.

After the trial court granted Petitioners' motion to disburse funds deposited in the registry of the court, pursuant to §718.401(4), Fla. Stat., Respondents took an interlocutory appeal. Later, upon the trial court dismissing the count of Respondents' Fourth Amended Complaint which is at issue sub judice, for failure to state a cause of action, another appeal was taken. The two were consolidated.

The Florida Fourth District Court of Appeal, while reversing the trial court in relevant part, certified four issues to the Florida Supreme Court. (App. 15-23). The Florida Supreme Court affirmed the District Court of Appeal, and expressly "approved its decision. (App. 14).

Upon denying Petitioners' Motions for Rehearing and for Clarification (App. 5-6), the Supreme Court, on

October 27, 1983, issued its Mandate, remanding the case to the trial court.

Six days later, on November 2, 1983, Petitioners filed a separate Complaint for Declaratory Relief in the United States District Court for the Southern District of Florida, seeking a declaratory judgment on the very same issue they bring before this Court. (R.A. 1-5).

As paragraph 7 of the Complaint for Declaratory Relief alleges, in relevant part:

> . . . the case has never, at the trial stage, progressed to the stage of ANGORA or KOSOW filing an answer to the ASSOCIATION's claim that the escalation clause of the contract is void under §718.401(8), by virtue of the "incorporation clause".

This is accurate to the extent that, as of the time of the filing of the Complaint for Declaratory Relief, Petitioners (as defendants) had not yet been required to file their answer to that count of the Complaint.

On January 23, 1984, the instant Petition for Writ of Certiorari was docketed in this Court.

On February 22, 1984, Petitioner (Defendant) KOSOW finally served his Answer to Amendment to Sixth Amended Complaint. (R.A. 8-12). Petitioner (Defendant) ANGORA had previously filed an Answer adopting and incorporating the allegations and affirmative defenses of KOSOW. (R.A. 6-7).

While this Petition for Writ of Certiorari arises from an appeal from an Order granting a motion to dismiss under the Florida equivalent of Rule 12(b)(6), Fed.R.Civ.P., both Florida appellate courts took notice of certain facts which are not apparent from the face of their decisions, but are revealed throughout the 9-year old record amassed in this case.

First, the Lakeside Village Condominium complex consists of a total of 766 condominium units. Second, the condominium documents at issue were drafted by an attorney. Finally, Petitioners have, at all times during this litigation, been represented by well-known and highly respected counsel. For example, before the Florida Supreme Court, Petitioner KOSOW was represented by Chesterfield Smith, the former President of the American Bar Association. *Angora Enterprises, Inc. v. Cole*, 439 So.2d 832 (Fla. 1983).

ARGUMENT

I.

THIS COURT SHOULD DECLINE JURISDICTION FOR LACK OF A FINAL JUDGMENT OR DECREE.

The two appellate decisions from which Petitioners seek review reversed a dismissal for failure to state a cause of action (claim upon which relief may be granted). These opinions, while they may constitute the law of the case, are in no sense "final judgments"; they are merely approvals of Respondents' pleadings. The result of the decision of the Florida Supreme Court was merely that Petitioners had to file an answer to the Complaint.

On this basis alone, this Court should decline jurisdiction. 28 U.S.C. §1257; *O'Dell v. Espinoza*, 456 U.S. 430 (1982); *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621 (1981).

II.

PETITIONERS HAVE WAIVED THEIR RIGHT TO SEEK REVIEW ON THE QUESTION PRESENTED.

The controversy between the parties is currently being litigated in three forums, including this one. No one, and no time limitation, forced the Petitioners to file suit in the United States District Court. It was a purely voluntary move on their part, notwithstanding the fact that it is an attempt at an "end run" around the existing lawsuit. Still, the suit has been filed, and Petitioners have been vigorously maintaining therein that the issue they seek to have this Court review was not decided by the Florida Supreme Court. Regardless of Respondents' position (that the Florida Supreme Court did decide the issue), Petitioners cannot have it both ways. By filing suit in the United States District Court, they must be deemed to have waived their right to file the instant Petition for Writ of Certiorari, which takes a completely inconsistent position from that being advanced in the District Court.

Back in the Florida trial court, however, Petitioners have taken a position inconsistent with the one they take before this Court: they have not pled the affirmative defense which (on page 6 of their Petition), they complain they have never had the opportunity to assert.

Under Florida practice, Petitioners are deemed to have waived this defense by not pleading it in their Answer. Rules 1.110(c), (d), and 1.140(h) Fla.R.Civ.P.; *e.g.*, *Sottile v. Gaines Construction Co.*, 281 So.2d 558 (Fla. 3d DCA 1973). Yet, their Petition for Writ of Certiorari argues, on page 6, that this affirmative defense of "no knowing and intelligent waiver" is one which was not properly before the Florida appellate courts. Petitioners take the same position in the United States District Court, arguing that to the extent the Florida courts have decided this issue, they have been denied a full and fair hearing on the merits. Yet, when the time finally came for them to plead their affirmative defenses in the trial court, they did not raise the issue. All of the grounds for their now unsuccessful motion to dismiss have been repeated,[1] and they have raised a number of new affirmative defenses, but they have not raised the issue they seek to have this Court decide.

Accordingly, Petitioners may not continue to ask this Court to reverse the Florida courts on an issue which is not part of Petitioners' case. This is not a case of "failing to raise the issue below", rather, it is a case of raising the issue and then dropping it.

Under the circumstances, no case or controversy exists anymore. The issue has become moot by Petitioners' own actions.

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[1]A questionable, but very common, practice under the Florida Rules of Civil Procedure.

III.

PETITIONERS ARE JUDICIALLY ESTOPPED FROM SEEKING A WRIT OF CERTIORARI.

While Respondents recognize that the doctrine of judicial estoppel is generally restricted to situations where the party asserting the earlier contrary position there prevailed on that position, it is submitted that application of the doctrine is appropriate in the case at bar, where Petitioners are taking three different positions in three different courts. As the Fourth Circuit Court of Appeals recently noted, the essential function and justification of the doctrine is:

> . . . to prevent the use of "intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice".

Allen v. Zurich Insurance Company, 667 F.2d 1162, 1167 (4th Cir. 1982).

Judicial estoppel does not involve "pleading in the alternative" in the same forum; that is a permissible practice, as the court may evaluate the conflicting claims and reach a result which is internally consistent. Instead, the doctrine is applied in circumstances such as these to prevent the party from "playing fast and loose" with the courts, and to protect the essential integrity of the judicial process. *Allen*, *supra*, at 1166; *Scarano v. Central R. Co.*, 203 F.2d 510, 512-513 (3rd Cir. 1953); *Selected Risks Insurance Co. v. Kobelinski*, 421 F. Supp. 431 (E.D. Pa. 1976).

If Petitioners' filing of the Complaint for Declaratory Relief in the United States District Court may be characterized as an "end run", then their advancing an issue in this Court which they have waived in the trial court may only be characterized as a "flea flicker", in which they present an issue to this Court which they intentionally fumbled in the trial court.

IV.

THE DECISIONS OF THE FLORIDA COURTS ARE NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

The Florida courts have announced no rule of law contrary to this Court's standard for determining waiver of constitutional rights.

First, the freedom from legislative impairment of contract protected by Article I, §10 is not a fundamental right of the kind subject to the standards urged by Petitioners.

Further, the Florida courts have announced no rule of law contrary to this Court's standards for waiver of constitutional rights. To the contrary, the decisions are consistent with this Court's decision in *D. H. Overmyer, v. Frick Co.*, 400 U.S. 174 (1972). In *D. H. Overmyer, supra*, one party was trying to avoid the effect of a negotiated and bargained-for contract provision drafted by his own attorneys. This Court noted that where a contract is one of adhesion, with great disparity in bargaining power, and where the debtor receives nothing for his waiver, then other consequences might ensue; however, under the circumstances of that case

there was a valid waiver of the defendant's due process right of notice and opportunity to be heard.

The instant case goes even beyond *D. H. Overmyer, supra*, in that it was Petitioner/developer ANGORA which not only drafted the contract, but signed it itself. True, there was no negotiation or bargaining, and the contract is one of adhesion; however, the shoe is on the other foot: it was Petitioner ANGORA who imposed this contract on the Respondents. Further, as is clear from the decisions of the Florida courts, the Petitioners knew full well they were agreeing to be bound by future legislation.

Petitioners argue that implying a waiver from the language at issue is improper because the language on its face does not constitute a waiver. The Florida courts, however, have found the disputed contractual language to be unambiguous. As the Fourth District Court of Appeal stated:

> Has the lessor expressly consented to the statute's incorporation into the terms of the contract in the case now before us? We believe the answer is "yes".

(App. 16). The Supreme Court addressed the same question, and reached the same result:

> And to say that the lessor who in his corporate capacity was both the developer and the management firm, did not agree to the terms of the declaration is to refuse to see what is plainly written in black and white.

* * *

> Since the parties had agreed to be governed by amendments to the Act, they therefore agreed to be bound by the purview of this statute.

(App. 12). Petitioners also attempt to belittle this Court's opinion in *United States Mortgage Co. v. Matthews*, 293 U.S 232 (1934). This case remains good law, however, and is directly on point. The attempted distinction between the cases, on the basis that *Matthews* involved a change in a remedy, rather than a substantive right, is without foundation, when dealing with the protection of the Contract Clause. *City of El Paso v. Simmons*, 379 U.S. 497 (1965).

The Contract Clause protects existing contractual relationships, and the rights and responsibilities of contracting parties. *Allied Structural Steel Co. v. Spannaus*, 438 U.S 234 (1978). Thus, when the Contract Clause is invoked, the court must determine the nature and effect of the alleged agreement, and whether it has been impaired. It is for the court to decide what agreement resulted from the language employed. *United States Mortgage Co., supra.* As this Court found in *United States Mortgage*, and as the Florida appellate courts have found in the case at bar, the agreement of the parties was to be bound by future amendments to the governing statutes. Thus, the statutes could not operate to impair any contractual rights or obligations.

This case presents merely a private version of the situation envisioned by Mr. Justice Story in his concurring opinion in *Trustees of Dartmouth College v. Woodward*,

17 U.S. (4 Wheat.) 518, 712 (1819), and subsequently approved of by this Court in operation. *E.g., Greenwood v. Freight Company*, 105 U.S. 13 (1881); *compare, Beronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843).

Petitioners also argue they have had no opportunity to adduce evidence relevant to this issue. But what evidence could they introduce which might relieve them from the provisions of their own contract? Since the Florida courts have found the language to be clear and unambiguous, there is no parol evidence which may be taken to clarify same. So, what other facts could they be talking about? Will they claim coercion or duress? That is doubtful: there was no one "on the other side" to coerce them; they drew these documents themselves.

V.

THE DECISION OF THE FLORIDA SUPREME COURT RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

The Florida Supreme Court's decision, resting as it did on its prior decision in *Century Village, Inc. v. Wellington E, F, K, L, H, J, M & G Condominium Association*, 361 So.2d 128 (Fla. 1978), rests on adequate and independent state grounds: Florida contracts law. It does not matter that Petitioners have re-worded the issue in this case in an attempt to create a federal question. The issue is, and always has been, one of state contract law.

The progenitor of the "automatic amendment" doctrine as applied to Florida condominiums is *Kaufman*

v. Shere, 347 So.2d 627 (Fla. 3d DCA 1977), *cert. denied*, 355 So.2d 517 (Fla. 1978). In *Kaufman, supra*, neither the trial court nor the appellate court had to reach the constitutionality of retroactive application of the statute prohibiting escalation clauses, for by use of express language adopting and incorporating the Condominium Act *"as it may be amended from time to time"*, the court held the parties contractually agreed to be bound by amendments to the Act enacted in the future. *Id.* at 628 (emphasis in original).

Century Village, supra, expanded on *Kaufman, supra*. There, the Florida Supreme Court was faced with application of another amendment to the Condominium Act (providing for deposit of rent into the registry of the court) to a pre-existing lease. Application of the statute was attacked on the grounds of impairment of the obligation of contract, in violation of Article I, §10 of the United States and Florida Constitutions.

The Supreme Court held that no constitutional question was raised.

> Because we find the appellant in this case, by specific language contained in its Declaration of Condominium, expressly agreed to be bound by all future amendments to the Condominium Act, including, but not limited to Section 711.63(4), we need not reach this constitutional question.

Century Village, supra, at 132. The Century Village declaration of condominium contained the exact same language as the Declaration of Condominium in this case, incorporating by reference the provisions of the

Act, and defining the Act to mean and refer to it *"as the same may be amended from time to time"*. *Id.*, at 133. (Emphasis in original). Thus, the Florida Supreme Court held,

> By express language, the declaration provided for the adoption of future legislative acts as amendment to the original declaration. Thus, the provisions of Section 711.63(4) were specifically incorporated by reference. This holding is consistent with that reached by the Third District Court of Appeal in *Kaufman v. Shere*, ... We therefore hold that because Section 711.63(4) is incorporated by reference as part of the controlling document of Century Village, no constitutional question of impairment of contract is raised.

Id., at 133.

In *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1980), the Supreme Court reached the question it had expressly reserved in *Century Village, supra*: the constitutionality of the "rent deposit" statute, §711.63(4), *renumbered* §718.401(4), Fla. Stat., in light of the Contract Clause. The Court held:

> As applied retroactively, *absent a lessor's express consent to its incorporation into the terms of the contract*, the statute is invalid.

Pomponio, supra, at 782 (emphasis supplied).

Such was the settled Florida case law in the face of which this case arose.

Most of the Florida District Court of Appeal's discussion centered on application of the rent deposit statute. The court, after noting the Florida Supreme Court's decision in *Pomponio, supra*, held there was no constitutional prohibition against application of the statute because of the Petitioners' express consent to the statute's incorporation into the terms of the contract. Thus, in answer to the question, "(h)as the lessor expressly consented to the statute's incorporation into the terms of the contract in the case now before us?", the court answered, "Yes", relying on *Century Village, supra*, where the Florida Supreme Court found that it need not reach the constitutional question because the developer expressly agreed to be bound by all future amendments to the Condominium Act. After noting that the relevant language in the two declarations was "virtually identical", the District Court of Appeal rejected arguments of contract interpretation advanced by Petitioners, and held the statutes applicable and enforceable in the instant case. The Court also rejected Petitioners' arguments that this was not their intent in inserting this clause in the condominium documents.

> However, the developer-lessor should not expect to be able to invoke the "from time to time" language when it suits its purpose to do so and reject it when not to its taste and advantage. The developer-lessor has quite simply been hoisted on its own petard by these particular amendments.

(App. 19).

The Florida Supreme Court, in affirming in all respects, also expressly acknowledged Petitioners'

argument that the escalation clause statute could not have been applied "under" *Fleeman v. Case*, 342 So.2d 815 (Fla. 1976), and rejected the argument by agreeing with the District Court of Appeal that this case was controlled by its earlier decision in *Century Village, supra.*

Therefore, it is clear that the decision of the Florida Supreme Court rests on adequate and independent state grounds: Florida contracts law.

VI.

PETITIONERS' REQUEST FOR CERTIFICATION IS WITHOUT MERIT.

The decision of the Florida Supreme Court is quite clear. Unlike the cases cited on page 11 of the Petition, the Florida appellate courts' opinions show on their face that the decisions rest on adequate and independent grounds of Florida contract law, and that the constitutional issue raised by Petitioners, whether decided or not, was not necessary to the judgment rendered.

CONCLUSION

Based on the foregoing, the Petition for Writ of Certiorari should be denied, without delay.

Respectfully submitted,

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By _____
MARK B. SCHORR

Appendix

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 83-8587-CIV-JCP

ANGORA ENTERPRISES, INC.,
and JOSEPH KOSOW,

Plaintifs,

v.

CONDOMINIUM ASSOCIATION OF
LAKESIDE VILLAGE, INC.,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF

(1) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331. Plaintiffs seek a declaratory judgment, pursuant to 28 U.S.C. §§2201-2202, to declare their rights under Article I, §10, the contract clause of the Constitution of the United States, with regard to the validity of a certain provision in a contract existing between the parties.

(2) In 1974, ANGORA ENTERPRISES, INC., a Florida corporation engaged in Condominium development, entered into eleven identical long-term leases of recreational facilities in Palm Beach County, Florida, with the Defendant CONDOMINIUM ASSOCIATION OF LAKESIDE VILLAGE, INC., binding each unit owner to pay a proportional share of the rent on the recreational lease as a common expense of the condominium. The leases all contained a rent escalation clause which was tied to the cost-of-living index, calling

for readjustment at five-year intervals. (See Exhibit A attached.)

(3) The agreement between the parties provided in Article I of the Declaration of Condominium that the provisions of the Condominium Act of the State of Florida, F.S. 711 *et seq.*, are "hereby incorporated by reference and included herein. . .". "Condominium Act" is further defined in the agreement as "the Condominium Act of the State of Florida (F.S. 711 *et seq.*) *as the same may be amended from time to time*". (See Exhibit B attached and hereafter referred to as the "incorporation clause".) At the time of the parties' agreement and execution of the long-term lease, rent escalation clauses were authorized by Chapter 711, Fla.Stats.

(4) In 1977, the Florida legislature enacted §718.401(8), Florida Statutes, declaring escalation clauses to be void. Retroactive application of that added subsection would be violative of Article I, §10, of the Constitution of the United States, and the Florida Supreme Court has so held in *Fleeman v. Case*, 342 So.2d 815 (Fla. 1976).

(5) In 1977, Plaintiff JOSEPH KOSOW purchased the recreation leases from ANGORA for $570,000.00. ANGORA retains an interest in the long-term leases as the mortgagee on the purchase money mortgage, as well as the mortgagor on a first mortgage to First Federal Savings and Loan Association.

(6) In 1977, the Defendant ASSOCIATION sought, *inter alia*, to enforce the §718.401(8) prohibition on escalation clauses by claiming in a lawsuit brought

against the Plaintiffs that the rent escalation portion of the agreement between the parties was void.

(7) The litigation between the parties has resulted in several reported opinions by virtue of trial court dismissals of the ASSOCIATION's various claims, on motions to dismiss filed by plaintiffs. *Cole v. Angora Enterprises*, 370 So.2d 1227 (Fla.4th DCA 1979), *Cole v. Angora Enterprises*, 403 So.2d 1010 (Fla.4th DCA 1981), *Angora Enterprises v. Cole*, ____ So.2d ____ (Fla. 1983). However, the case has never, at the trial stage, progressed to the stage of ANGORA or KOSOW filing an answer to the ASSOCIATION's claim that the escalation clause of the contract is void under §718.401(8), by virtue of the "incorporation clause".

(8) The state court litigation has not presented, reached or addressed the federal constitutional claims presented here, nor have those claims been procedurally available for presentation to the state trial court.

(9) The ASSOCIATION's actions pose an actual case or controversy with the Plaintiffs, insofar as the ASSOCIATION seeks to withhold, and has withheld, payment of any escalated rental monies due under the lease agreement, claiming that the "incorporation clause" set forth in paragraph 3 above rendered the escalation clause provision unenforceable under §718.401(8), Florida Statutes.

(10) Section 718.401(8), Fla.Stats, cannot be retroactively applied to the agreement in issue and its application to the agreement constitutes an unconstitutional legislative impairment of contracts.

(11) The "incorporation clause" in the agreement does not constitute an intentional relinquishment of Plaintiffs' Article I, §10, Constitutional guarantee, and Plaintiffs have not and have never intended to waive or acquiesce in relinquishing their right to be free from legislative impairment of contracts, through the condominium documents or otherwise.

(12) The actions of the Defendant ASSOCIATION are causing economic injury to the Plaintiffs, and threaten to cause continuing economic injury.

(13) A declaration of the federal standard for determining waiver of federally guaranteed constitutional rights, and application of that standard to the dispute now existing between the parties will resolve the uncertainty between the parties and provide them with a declaration of their respective rights, authorized by 28 U.S.C. §2201.

WHEREFORE, Plaintiffs respectfully request that:

(A) The Court assume jurisdiction of this case;

(B) The Court declare that the incorporation clause at issue does not constitute a waiver of the Plaintiffs' Article I, §10, guarantee of freedom from legislative impairment of contracts; and that application of §718.401(8), Fla.Stat., to Plaintiffs' lease would constitute an unconstitutional impairment of contract; and

(C) The Court grant such other relief as it may deem just and proper, including the awarding of costs and attorney's fees.

Respectfully submitted,

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and

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By: Gerald Mager
GERALD MAGER

By: Linda K. Raspolich
LINDA K. RASPOLICH

IN THE CIRCUIT COURT FOR THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY – CIVIL DIV.

CASE NO. 75-574 CA (L) 01 D

BENJAMIN COLE and
MIRIAM COLE, his wife, et al.,
Plaintiffs,

vs.

ANGORA ENTERPRISES, INC.,
a Florida corporation, et al.,
Defendants.

ANSWER OF DEFENDANTS ANGORA ENTERPRISES, INC. and AMERICAN CAPITAL CORP. TO AMENDMENT TO SIXTH AMENDED COMPLAINT

COME NOW the Defendants, ANGORA ENTERPRISES, INC. and AMERICAN CAPITAL CORP., by and through their undersigned attorney, and for Answer to the Amendment to the Sixth Amended Complaint state that they deny each and every allegation contained therein and adopt by reference and include in this Answer all of the Affirmative Defenses previously pled by these Defendants in their Answer served April 29, 1981 as well as all the Affirmative Defenses of the Defendant, JOSEPH KOSOW heretofore and hereinafter filed to the Amendment to Sixth Amended Complaint.

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 9th day of FEBRUARY, 1984, to MARK B. SCHORR, ESQUIRE, P.O. Box 9057, Fort Lauderdale, Florida, 33310, and MAURICE M. GARCIA, ESQUIRE, P.O. Box 650, Hollywood, Florida, 33022.

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By Robert S. Levy
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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA. CIVIL DIVISION

CASE NO. 75-574 CA (L) 01 D

BENJAMIN COLE and
MIRIAM COLE, his wife,

Plaintiffs,

-vs-

ANGORA ENTERPRISES, INC.,
a Florida corporation, et al.,

Defendants.

ANSWER TO AMENDMENT TO SIXTH AMENDED COMPLAINT

Defendant, KOSOW, answers the Amendment to Sixth Amended Complaint and alleges as Follows:

COUNT V

37. Admitted.

38. Defendant realleges his answers to the cited paragraphs.

39. Defendant admits the enactment of the cited statutes subsequent to the execution of the subject Declarations of Condominium and Leases, admit that the Leases contain an escalation clause and deny all allegations of paragraph 39 not expressly admitted.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

AFFIRMATIVE DEFENSES

A. Count V fails to state a claim against the Defendant, JOSEPH KOSOW, and affords Plaintiffs no relief as JOSEPH KOSOW did not submit any of the subject property to condominium ownership. KOSOW is not a signator to any Declaration of Condominium.

B. Count V fails to state a claim for relief for to the extent that KOSOW is bound by the Declaration of Condominium, it specifies the exclusive method of its amendment. Specifically, the Declaration may not be amended without the written approval of the Lessor under the Long Term Lease. KOSOW never agreed in writing to any Amendment to the Lease which would have incorporated subsequently adopted legislative enactments.

C. Count V affords Plaintiffs no entitlement to relief as the Lease is a Lease of separate property and any modification of the obligations of the Declaration of Condominium is distinct and severable from any modifications of the Lease.

D. As an affirmative defense, Defendant asserts that the Lease provides for its exclusive method, to the exclusion of amendment by adoption of subsequent legislative enactments.

E. As an affirmative defense, Defendant asserts that his Lease is not bound by subsequent amendments to Chapter 711, Florida Statutes, for the term "Condominium Act" as defined within the Declaration of Condominium is not a term utilized within the rent or rent adjustment clause of the Long Term Lease.

F. As an affirmative defense, Defendant asserts that the Statute which prohibits cost of living clauses in recreation leases is unconstitutional as violative of the state and federal constitutional guarantees of equal protection under the law. Specifically, the Statute discriminates against this Defendant by prohibiting enforcement of escalation clauses based upon a cost of living formula while failing to impose similar sanctions upon the Government of the United States or the State of Florida or any political subdivision thereof or any agency of any political subdivision thereof. In fact, the Statutes specifically exempt the aforementioned entities.

G. As an affirmative defense, Defendant asserts that the language contained within the Declaration of Condominium submitting specified property to condominium form of ownership pursuant to Florida Statute, et seq. "as the same may be amended from time to time" is ambiguous. Defendant maintains that it was not the intent of the developer in any way to permit the substantive rights of any parties or future condominium unit owners to be affected by the unpredictable, unknown and unfathomable acts of legislative bodies at some future time or in any way whatsoever either affirmatively, negatively, or in any other manner, including but not limited to, the matter raised by the Plaintiffs in their Complaint as amended.

H. As an affirmative defense, Defendant asserts that even if subsequent amendments to the Condominium Act are incorporated into and made a part of the Membership and Use Agreement and Management Agreement, the same are incorporated only to the extent that they are fair and reasonable. The amendment urged by Plaintiffs is neither fair nor reasonable.

I. Plaintiff is estopped from seeking the return of rentals, its members have used and benefitted by the recreation lease and facilities.

J. Plaintiff is estopped from seeking the refund of recreation lease payments as all payments were voluntarily made.

K. Plaintiff is not entitled to relief as Plaintiff has by its voluntary payment of escalated rents placed a practical construction upon the terms and provisions of the lease inconsistent with Plaintiff's theory of automatic statutory amendment.

L. This action is barred by the Statute of Limitations, Laches or both.

M. As an affirmative defense, Defendant asserts that the recreation lease(s) would not have been executed but for the understanding that it contained a cost of living clause which would be honored by the Association and the unit owners and would not be affected by future and unknown legislative acts. The escalation clause was a material, integral and essential portion of the recreation lease. The result urged by the Condominium Association here is clearly a result not intended by the parties and clearly predicated upon a bilateral or unilateral

mistake of fact and/or law. Plaintiffs' action seeks to deprive Defendant of the benefit of his bargain thereby resulting in an unfair and an unintended benefit being conferred upon the Association and the unit owners with a corresponding detriment, inequity and unconscionable result being visited upon the Defendant.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to MARK B. SCHORR, ESQUIRE, Becker, Poliakoff & Streitfeld, P. A., Attorneys for Plaintiffs, Post Office Box 9057, Fort Lauderdale, Florida 33310-9057; and to ROBERT S. LEVY, ESQUIRE, 502 Forum, III Building, 1665 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401 on this 22 day of February, 1983.

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BY: Maurice M. Garcia
MAURICE M. GARCIA

NO. 83-1209

in the
Supreme Court
of the
United States

ANGORA ENTERPRISES, INC.,
and JOSEPH KOSOW,

Petitioners,

vs.

BENJAMIN COLE and
MIRIAM COLE, his wife, et al.,

Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE NEED FOR A CERTIFICATE TO THE FLORIDA SUPREME COURT

The Petition for Writ of Certiorari forthrightly asserted the odd posture of this case. (Petition at 2, n. 1). The Respondent's Brief in Opposition to Certiorari confirms the dilemma faced by Petitioners.

First, Respondents assert that the Florida Supreme Court decision which allowed contractual "as amended" language to act as a waiver of Article 1 §10 rights is not a final judgment. Nevertheless, they contend it "may constitute the law of the case". Brief in Opposition at 3. In the pending United States District Court action, Respondents moved to dismiss, adamantly claiming the disputed issue had been "conclusively determined" in the State litigation. (App. 1).

That adamancy led to the filing of the Petition in this case. Rather than risk being dismissed from District Court with that Court saying certiorari was the proper course, certiorari, or a certificate to the Florida Supreme Court, was sought here.

Having made that choice, Respondents condemn the Petitioners for attempting an "end run" and argue the filing of the District Court suit somehow waives the right to seek certiorari. Brief in Opposition at 4. Then they attack Petitioners for not having raised in the state court on remand from the Florida Supreme Court, the very issue which they maintain has already become the law of the case. *Id.* at 5. Along the same vein, the Respondents maintain that the Petitioners have taken varying positions which constitute "fast

and loose" playing, thereby triggering "judicial estoppel". *Id.* at 6.

The record must be set straight. Petitioners seek only to resolve the question on which Respondent has taken varying positions. Did the Florida Supreme Court finally decide a federal question of the standard for determining waiver of federal constitutional rights? We have doubts, and stated them in the Petition. But the federal jurisdictional problems created by the shifting contentions of the Respondents requires the clarification which may only be provided by the certificate process.

As the discussion below shows, if the Florida Supreme Court did answer the federal question of Article 1 §10 waiver, certiorari should be granted.

I

THE JUDGMENT IS FINAL FOR REVIEW PURPOSES

We agree that the decision of the Florida Supreme Court did not end the state case. Indeed, since the decision merely approved Respondents' pleadings, one could say the state case has just begun. Yet, on the critical issue – Article I, §10 waiver – the Respondents argue that the case has ended by virtue of the Florida Supreme Court decision.[1]

[1]The remaining issues are framed by the Respondents' Sixth Amended Complaint. It raises questions under the recreation lease which are separate from the federal question. Those claims of unconscionability, fraud, unfair and unreasonable covenants running with the land, misrepresentations regarding leasehold improvements and the need to provide certain leasehold

In that circumstance, this case is one of those few which permit the Court to accept jurisdiction "without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Cox Broadcasting v. Cohn*, 420 U.S. 469, 477 (1975). Since, according to Respondent, the additional proceedings cannot address anew the federal question presented here, the case falls within the *Mills v. Alabama*, 384 U.S. 214 (1966), and *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), categories, as *Cox* described them at 479-80.

(Footnote 1 Continued)

improvements are distinct from the question whether retroactive application of the statutory preclusion of recreation lease escalation clauses was waived.

II

THE DECISION BELOW DOES NOT REST UPON AN ADEQUATE AND INDEPENDENT STATE GROUND

The decision of the Florida Supreme Court did rest upon its application of contract law. Thus we acknowledge the Florida contract law basis for deciding the meaning of a contract provision which agrees to be bound by future law "as amended".

But that is only half the inquiry. The Respondents beg the other half of the inquiry—adequacy—by saying "the Petitioners knew full well they were agreeing to be bound by future legislation." Brief in Opposition at 8. The real question is did the Petitioners' use of the "as amended" language mean they knew full well they were agreeing to be bound by future *unconstitutional* legislation?[2] That is a federal question, not a question of state contract law. "[W]aiver affecting federal rights is a federal question." *Fay v. Noia*, 372 U.S. 391, 439 (1963); *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972).

Therefore, the Florida Supreme Court's decision resting on contract law, while an independent ground, was not an adequate ground, for it failed to address the

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[2]There is no dispute that the retroactive application of the statute banning rent escalation would have violated the Contract Clause, were it not deemed "agreed to" by the decision below. (Pet. App. 13).

issue through the federal constitutional prism through which it must be viewed.[3]

If the issue is held up to proper light, the nature and importance of the federal question becomes apparent.

[3]Certainly it cannot be said that the Florida Supreme Court provided a clear and express statement that its decision rested on adequate and independent state grounds. *Michigan v. Long*, ___ U.S. ___, 103 S.Ct. 3469, 3476 (1983). The Respondents urge that conclusion, and although the Court has avowed its distaste for seeking clarification from the state courts, *id.* at 3476, n. 7, the urgency with which the Respondents deny the existence of a federal question here, and claim elsewhere its conclusivity, makes this case a good candidate for clarification in order to avoid unnecessary judicial energy in further lower court proceedings.

III

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT

There can be no disagreement that a statutory provision which precludes a party from enforcing the heart of the contract, in this case, a cost of living escalation clause, impairs the contract. The Florida Supreme Court has agreed with that proposition. *Fleeman v. Case*, 342 So.2d 818 (Fla. 1977).

This Court's early distinction between legislative changes in remedies, and impairment of obligations, draws the distinction well and confirms the impairment accomplished by the Florida Statute. cf. *Bronson v. Kinzie*, 42 U.S. (1 How) 311, 315-16 (1843). *Bronson's* discussion of the right-remedy difference, "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract" *id.* at 316, serves to distinguish *United States Mortgage Co. v. Matthews*, 293 U.S. 232 (1934), the only case offered to glean waiver from "as amended" language. That case involved a remedial change which was not an impairment of an obligation. Thus, it does not support Respondents' assertion that "as amended" language constitutes waiver of contract clause protections.

Indeed, Respondents have cited no case which diminishes the force of our argument that the decision below conflicts with this Court's decisions governing the standard for determining waiver of federal

constitutional rights. *See*, Petition for Certiorari at 7-10.

The Respondents pose several rhetorical questions regarding the nature of a waiver inquiry, and state: "Since the Florida courts have found the [contract] language to be clear and unambiguous, there is no parol evidence which may be taken to clarify same." Brief in Opposition at 10. That approach reflects the Respondents failure to understand that the question is not one of contract law, it is a federal question requiring an inquiry into background facts to determine whether the language was a knowing and intelligent waiver of a fundamental constitutional protection. *D. H. Overmyer Co. v. Frick*, 405 U.S. 174, 185-86 (1972).

Ultimately, the factual question is whether Petitioners knowingly and intelligently agreed to be bound by changes in Florida law which would impair the obligation of their contracts and otherwise be invalid under Article I §10 of the Constitution. That is the heart of this case.

CONCLUSION

If the Florida Supreme Court has answered that federal question affirmatively, certiorari should be granted.

If the Florida Supreme Court decision is unclear as to whether it has answered that federal question, the certificate process should be invoked.

If the Florida Supreme Court has not answered that federal question, and it remains open for litigation, certiorari should be denied.

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BY:_____
BRUCE S. ROGOW

March 1984

Appendix

[RECEIVED DEC-6 1983]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 83-8587 CIV-JCP

ANGORA ENTERPRISES, INC.,
and JOSEPH KOSOW,

Plaintiffs,

vs.

CONDOMINIUM ASSOCIATION OF
LAKESIDE VILLAGE, INC.,

Defendant.

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

Defendant, by and through its undersigned attorneys, hereby moves this Court dismiss the Complaint, on the following grounds:

1. Failure to state a claim upon which relief can be granted, as Plaintiffs are collaterally estopped from re-litigating the very same issues, which have been conclusively determined against them in the state court litigation between the parties.

2. Lack of jurisdiction over the subject matter, as the District Court has no jurisdiction to review, or reverse, state court decisions.

3. Lack of jurisdiction over the subject matter, as no federal question is presented.

4. Failure to state a claim upon which relief can be granted, on the merits, as parties may agree to be bound by future amendments to governing law.

5. As to Plaintiff ANGORA ENTERPRISES, INC., failure to state a claim upon which relief can be granted, for lack of standing.